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IN THE

SUPREME COURT OF THE UNITED STATES

155

OCTOBER TERM, A. D. 1963

No. [redacted]

MAURICE J. BREEN and ALYCE J. BREEN,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioners pray that a Writ of Certiorari issue to review the judgment and decree of the United States Court of Appeals for the Eighth Circuit entered in the above entitled case on February 26, 1964.

OPINION

The opinion of the Tax Court is reported as T.C. Memo 1962-230. The opinion of the Court of Appeals is reported at 328 F.2d 58.

JURISDICTION

Judgment and Opinion of the Court of Appeals was entered on February 26, 1964. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C.A., Sec. 1254 (1).

EXTENSION OF TIME TO PETITION

On the 30th day of April, A.D., 1964, the Honorable Byron R. White, Associate Justice of the Supreme Court of the United States, made an order extending the time for filing of the Petition for Writ of Certiorari in the above case to June 25, 1964.

QUESTIONS PRESENTED

Question I. Whether the taxpayer was entitled, with respect to a $4,200.00 fee received in 1955, to the benefit of the spreading provisions of Section 1301 of the Internal Revenue Code of 1954, 26 U.S.C.A. 1301.

Points

(a) Was the meaning of Sec. 107 (a) of the 1939 Code (spreading of personal services income) altered by Section 1301 in the 1954 Code?

(b) What significance, if any, can be attached to the words "to effect a particular result" (Sec. 1301 (b)

of 1954 Code) with reference to the personal services of corporation officers?

(c) If Sec. 1301 of the 1954 Code modifies or limits the spreading of income by corporation officers for personal services, should it be applied retroactively to income earned prior to 1954 while Sec. 107 (a) of the 1939 Code prescribed the rights of such officers?

Question II. Whether gains the taxpayer realized in 1955 and 1956 on two trustee's certificates were ordinary income, or were long-term capital gain, under the provisions of Section 318, Par. a (2) (B) Section 302 and Section 331 of the Internal Revenue Code of 1954.

Points

(a) Corporate liquidating dividends are paid to a Trustee who is holding the corporation stock for six beneficiaries, each of whom has a Trustee's Certificate showing his specific fractional interest in all of the stock so held by the Trustee.

(b) The Trustee transfers .5054 percent of the total of the liquidating dividends to one beneficiary, who held two certificates that totaled .5054 percent interest in all the stock held by said Trustee.

(c) The six months limitation and the capital asset feature are conceded.

(d) Does this certificate holder realize long-term capital gain on the profit between the "cost to him" and the "total of the liquidation dividends" paid by the trustee to him, or is he a "claimant" as against the Trustee and therefore the corporate liquidating dividend passed on to him for his proportionable share of his corporation stock, is nothing more than a payment on his *claim against the Trustee* and therefore *ordinary* income?

(e) Or again—the question may be stated, were these certificates delivered by the Trustee in 1931, negotiable pledges representing a certain fractional ownership in corporate stock held by the Trustee for the certificate holders, or were they nothing more than "claims" against the Trustee?

STATUTES AND REGULATIONS INVOLVED

Division I

Code Section 1301 (b).

"An employment means an arrangement, or series of arrangement, for the performance of personal services by an individual or partnership, to effect a particular result, regardless of the number of sources from which compensation therefor is obtained".
28 U.S.C.A., 1301.
Section 107 (a) of the 1939 Code, as amended.

Division II

Section 302 of the 1954 Code, provides:

"Sec. 302. Distribution in Redemption of Stock. (a) General Rule.—If a corporation redeems its stock (within the meaning of section 317 (b)), and if paragraph (1), (2), (3), or (4) of subsection (b) applies, such redemption shall be treated as a distribution in part or full payment in exchange for the stock".

Subsection (3) provides:

"(3) Termination of shareholder's interest.—Subsection (a) shall apply if the redemption is in complete redemption of all of the stock of the corporation owned by the shareholder".
Identified as 26 U.S.C.A., Section 302.

Section 331 of the 1954 Code provides:

"GAIN OR LOSS TO SHAREHOLDERS IN CORPORATE LIQUIDATIONS.

(a) General Rule.—

(1) Complete liquidations.—Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock".
26 U.S.C.A., Section 331.
Code Section 652 (b).

Section 662 (b) of the 1954 Code:

"The amounts determined under subsection (a) shall have the same character in the hands of the beneficiary as in the hands of the estate or trust".

POINTS AND LAW SUPPORTING SAME

Division I

POINT 1.

Directing a corporation by a lawyer for the specific purpose of selling the one corporate asset so as to liquidate the company as soon and as advantageously as possible is "an employment" to effect a particular result.

1939 Code, Section 107 (a).
1954 Code, Section 1301; 28 U.S.C.A. 1301.
Wattley v. *C.I.R.*, 275 F.2d 461.

POINT 2.

Congress intended no change in Section 107 (a) of the 1939 Code in enacting Section 1301 of the 1954 Code; 28 U.S.C.A. 1301.

Wattley v. *C.I.R.*, 275 F.2d 461.

POINT 3.

Statutes affecting change in substantive rights will not be given a retroactive effect.

New York Life Ins. Co. v. *Truesdale,* (4th Cir.) 79 F.2d 481.

82 C.J.S., page 994.

POINT 4.

In the absence of definite indication of a legislative purpose to that end, the re-enactment of a statute does not affect its meaning or enlarge its scope, nor does mere change in language necessarily indicate an intention to change the law.

82 C.J.S. 845.

Wattley v. *C.I.R.*, 275 F.2d 461.

Division II

POINT 1.

A "sale" in respect to being the third requirement for a long-term capital gain treatment is often supplied by a "statutory sale"—a condition that is a substitute for a conventional sale—by the Internal Revenue Code.

1954 Section 302; 26 U.S.C.A. 302.

1954 Section 318; 26 U.S.C.A. 318.

1954 Section 331 (a); 26 U.S.C.A. 331.

POINT 2.

Liquidating dividends retiring capital stock create a "sale of exchange".

1954 Code, Section 302; 26 U.S.C.A. 302.

POINT 3.

What is capital gain to a trustee is passed on as capital gain to the beneficiary.

1954 Code, Section 652(b); 26 U.S.C.A. 652.

Code, Section 662 (b); 26 U.S.C.A. 662.

Rev. Rul. 56-78, IRB 1956, 10, 27; also referred to as Rev. Rul. 56-78, C.B. 1956-1, 648.

CONCORDANCE OF 1954 CODE AND 1939 CODE WERE ESSENTIAL

1954 Code, Section 1301.

1939 Code, Section 107 (a), as amended.

1954 Code, Sections 651, 652, 661, 662.

1939 Code, Section 162 (b).

STATEMENT OF FACTS

Foreword

Petitioner has no illusions in respect to a Petition for a Writ of Certiorari in this Court, but again I think that I understand the frame of mind of the midlands taxpayers, most of whom have no facilities to question, or engage in any protracted litigation with the Internal Revenue Service, because it necessarily means long, costly and generally unsatisfactory litigation, because at all times at the lower levels the taxpayer is trying his case to his "adversary", so that by the time he (the taxpayer) reaches a conventional tribunal, that is not directly or indirectly related to the Internal Revenue Service, he is pretty well whipped, spirit-wise and money-wise—in fact, substantially all "resisters" are long gone before they reach a conventional court.

After the taxpayer has had his hearing before the Regional Commissioner and "observer"—not necessarily in his home state—he eventually receives Exhibit "C", and along with that is some advice—that we assume is supposed to be cheerful and sort of buoying (Par. 2, L-1 of last page of Ex. "C"). "The Tax Court of the United States is in no way connected with the Internal Revenue Service or Treasury Department". Either "true or false" (as the school examinations now say) it carries implications that are not too good.

Again—if the taxpayer is stubborn and persistent and struggles through a series of defeats, he is often confronted with an atmosphere, in the conventional courts, that indicates that the Court prefers to defer to the "experts" in the Tax Service (*Samuel Towers*, 24 T.C. 199, 247 F.2d 233; *Commissioner* v. *Bedford*, 325 U.S. 283).

We presume this same reasoning could be applied to the various other "bureau" tribunals, and it will be a sad day in America, if the time ever comes that the Courts make it a "rule" to "defer" to the "head tribunal" of these various agencies.

Division 1 (Spreading of Fees)

Involves the right of the petitioner. Maurice J. Breen, a lawyer, to spread a fee, or compensation, of $4,200.00 received in 1955, over the period of years during which it was earned, under the provisions of Section 1301 (b) of the Internal Revenue Code of 1954.

Generally speaking the Circuit Court raised no question about compliance with either the "thirty-six months requirement" or the "80% requirement" (Op. Page 8, Par. 2), but held against the taxpayer, on the theory that the services were not "an employment" (Op. page 19,

Par. 1), within Section 1301 (b) of the 1954 Code, which is said by the Court to have modified the statute that had been controlling (1939 Code, Sec. 107 (a)), prior to 1954. The services were performed after 1930 (Exhibit 8).

Whether the services were "an employment" under the provisions of Section 1301 (b) of the 1954 Code is an issue, and Exhibit 8 also shows that the services for which the $4,200.00 was paid were performed and earned before 1954, while and when Sec. 107 (a) of the 1939 Code prevailed, without the debatable modification of the 1954 Act.

The work, or services referred to, involved the holding title to *facilitate the holding and selling* of a 220 acre tract of coal land (which produced royalty) adjacent to the City of Des Moines, Iowa, and which had been owned by one Denis M. Kelleher of Fort Dodge, Iowa, and your petitioner, in a fiduciary capacity. Your petitioner was at all times president of the new holding corporation, and Kelleher was vice-president, and his wife, Mary S. Kelleher, secretary and treasurer. The *idea* ultimately served its purpose, as the coal royalties paid to the holding corporation provided the necessary funds to pay interest, taxes and mortgage payments, to avoid foreclosure, *until the time came*, when the land could be, and was sold for subdivision purposes for a Des Moines suburb (Exhibit 5 and Exhibit 6) (Transcript Page 9, Line 8 to Page 12, Line 20; Page 31, Line 20 to Page 33, Line 4).

The taxpayer was not interested financially in the company and, as far as duties involved the corporation, he was a "figure head" (the corporation) had no employees—and the so-called "officers" drew no salaries. Taxpayer's mission was to sell the land and liquidate the corporation and the stock.

This task took time—on account of the depression—but it was finally accomplished—but the Court held that it

was not an "employment" to "effect a particular result" because the taxpayer was listed as an officer and director of the corporation, that obviously could have no duties for its so-called "officers" to perform.

As a matter of fact, the taxpayer—as a lawyer—handled this Urbandale situation in the same fashion as he did, or would, any long drawn out legal matter. As a lawyer—and that is all—he had this Urbandale situation thrust upon him and there was no other solution available to him, except to sell the land and liquidate the holding company.

Division 2 (Capital Gain on Stock Certificates)

The second problem (*and more important issue*) concerns the right of Maurice J. Breen to report a profit of $18,943.29 that he made on the purchase of two Trustee's Certificates in 1955-1956, as "long-term capital gain" and not as "ordinary income".

It was conceded by the Circuit Court:

> "that the certificates were capital assets under Sec. 122's general definition of 'property held by the taxpayer'. And they were held by this taxpayer more than six months. The inquiry then is only whether the gain resulted from a 'sale or exchange'." On Pages 11-12.

These certificates were purchased by the petitioner in the spring of 1954 (Ex. 13 and Ex. 15), and each certificate represented a specific, fractional, "equitable ownership and beneficial interest" in 500 shares of Urbandale Company capital stock held by the Bank, as Trustee, for the benefit of six Certificate holders. One of these Certificates so purchased represented a .4666 interest, and the second Certificate a .0384 interest (Ex. 10 and Ex. 14), so that after

the purchase, the taxpayer owned a trifle more than a 50% interest in the 500 shares of the Urbandale Company stock held by the Bank-Trustee.

In 1955, the Urbandale Coal Company sold its one asset, that is, its interest in the 220 acre tract adjacent to Des Moines, for subdivision purposes, and it then *immediately liquidated* the Urbandale corporation, and retired all the capital stock by paying out all of the net receipts from the land sale as a liquidating dividend—one-half to the Bank-Trustee and one-half to Kelleher. The complete liquidating dividends received by the Bank-Trustee were in turn immediately *passed on* to the six Certificate holders (Ex. "B" of Ex. 6), and the liquidation of the corporation which began March 22, 1955, was closed December 31, 1955 (Trans. p. 16, ll. 1 to 8) and the final payment of the liquidating dividends by the Bank-Trustee (January 15, 1956) in turn resulted in the liquidation of the trusteeship (Ex. 16).

The Petitioner in April of 1954 purchased these two certificates for the sum of $2,650.00; when the corporation was liquidated, he received $8,258.00 in 1955 and $13,334.41 in January of 1956, as liquidating dividends on said corporation stock. That liquidated both the corporation and the trust (Final Report of Trustee, Ex. 6).

The two Trust Certificates (Exhibit 10 and Exhibit 14) above referred to were identical, and recited at the beginning of each certificate:

> (Ex. 10) "This certifies that First National Bank of Fort Dodge, Iowa, is the owner of a .4666 of the equitable ownership and beneficial interest in * * * two hundred and fifty (250) shares of the preferred stock and two hundred and fifty (250) shares of the common stock of the Urbandale Coal & Acreage Company of Fort Dodge, Iowa, title to which certificates

of stock is held by the First State Bank & Trust Company of Fort Dodge, Iowa, as trustee for the benefit of the holder or holders of this certificate and all similar certificates issued or to be issued by the trustee to evidence ownership of said beneficial interest in said property so held by it in trust" (Ex. 10).

During the years that the land was being held awaiting sale (1931 to 1947), many coal royalty dividends were paid, and treated as ordinary income (See Preamble to Exhibit "A" attached to Exhibit 6). In 1955 *the one asset* that the Urbandale corporation owned, to wit, the 220 acres of land, was sold, and the corporation completely liquidated, and the corporate stock *retired,* in about nine months time. One-half of the liquidating dividends were paid to the trustee and immediately passed on to the certificate holders in accord with their respective interests (Ex. "B" of Ex. 6, last 15 debits).

We quote the first six lines from "Exhibit A" attached to Exhibit 6 (the Trustee's Final Report), to wit:

> "Receipts by the trustee from the dividends from the operation, and *also the sale and liquidating dividends* of Urbandale Coal & Acreage Company. All of the receipts listed below, which were received by the Trustee, were immediately distributed in full". (Our emphasis).

All of the payments received by petitioner in liquidation of his two Certificates, which he purchased in 1954, were *liquidating* dividends paid by the corporation to the Trustee in liquidation and retirement of the stock held in trust *for the Certificate holders* and was immediately passed on by the Trustee to the Certificate holders, or beneficiaries, as liquidating dividends (Ex. 6, see Ex. "A", attached to Ex. 6).

Notwithstanding the fact that all of the money received by this petitioner after he purchased the two Certificates in 1954 was paid in liquidating dividends in 1955-1956, the Circuit Court held that this money was *ordinary income*.

Naturally, the Circuit Court has to come up with some explanation that would support his notion that liquidating dividends on corporation stock could be said to be "ordinary income".

There was no escape from the fact that these 1955-1956 payments from Urbandale to the trustee, and from the trustee to the six certificate holders, amounting to approximately $40,000, were in fact *liquidating dividends*, so naturally any "adjustment" had to be made with reference to the nature of the certificates and, of course, any "nature" that would be compatible with the Court's ruling would have to be something other than a fractional interest in the corporate stock that was being liquidated.

We assume the Circuit Court was not very happy with the reasoning of the Tax Court, because the Tax Court Judge worked his woy out of the *same situation* by calling the certificates "trustee's notes". Apparently the Circuit Court did not want to go along with that idea.

The new theory by the Circuit Court in substitution of the "Trustee's notes" notion, was to christen Exhibits 10 and 14 "Claims against the Trustee". It isn't too clear-cut, the general idea was that the six original claimants against the estate really didn't release their claims against the estate—even though Exhibit 5 and the Probate Record so provided. The "plan" was that these were sort of "partial releases"—applying to some of the estate property —but not to the part that they bought in at an open sale from the executor and estate.

Again, the sale, the deeds, et cetera, in consideration for the releases were in fact not ready sales or deeds, and this, of course, ultimately becomes pretty involved as a theory—but at any rate it was sufficient to support the Commissioner—just as the Tax Court's fiction about the "Trustee's notes" served the same purpose.

So the new plan is rather involved, but in substance it begins with the releases by the creditors in the Merritt estate and, although the releases were *absolute* as evidenced by Exhibit 5, page 9, Par. 1, which directs the trustee in payment of ($27,500 in claims) the purchase of the Merritt land, and some worthless bank stock from the estate, by the six large creditors to:

> "pay the purchase price therefor in the manner therein designed and expressed, viz. by surrendering, discharging and releasing the several claims of the First National Bank, Doris O. Merritt, Margaret Merritt, Olive Seay, Edna Richardson, Catherine Carey and Bridget Carey, and by executing the requisite contracts, vouchers and other instruments to evidence such discharge, satisfaction and release of said claims, in consideration of the application of the amount thereof upon the purchase price by said trustee bid for said property."

Notwithstanding the facts set forth above, and also in other parts of Exhibit 5, the absolute release of the claims on the court record, and the *deed by the executor* to the trustee of the land, and the immediate subsequent *deed by the trustee to the Urbandale company* (Trans. p. 10, l. 10 to l. 12), the Court said speaking of these releases by the six creditors, the sale and the deeds:

> "this, however, we do not construe and interpret as effecting a novation or basic change in the posture of the six creditors and their successors." (Op. p. 14, l. 33).

Again, the trust certificates recited in the very beginning, and in no uncertain terms (Exhibits 10 and 14) what they were. For instance, Exhibit 10 (and they were all alike except as to the name of the beneficiary, and the fractional interest in the trust):

> "This certifies that the First National Bank of Fort Dodge, Iowa, is the owner of a .4666 of the equitable ownership and beneficial interest in" (Exhibit 10),

and then goes on to describe the several stocks, only one of which is of importance because the others were worthless bank stock. However, the Circuit Court disposed of this hurdle (Op. p. 12, last paragraph):

> "It is true that each certificate recites that the holder 'is the owner of (a stated percentage) of the equitable ownership and beneficial interest in', named stocks, including Urbandale, 'title to which' is held by the trustee 'for the benefit of the holder'. *But labels do not determine ultimate character.*" (Our emphasis).

The Circuit Court did not attempt to explain the record (Trans. p. 10, l. 10); that the Merritt estate had deeded the land in question to the trustee, the trustee in turn had deeded it to the Urbandale company, and the Urbandale company had with the approval of the State Executive Council issued 1000 shares of stock against the land, of which one-half went to the trustee and one-half went to Kelleher.

Notwithstanding the directness and plainness of the record over the release of the claims, the sale of the land, and the forthright language of the certificates themselves, the Court still had another problem in that in 1952 the beneficiaries of the W. N. Merritt estate, *all of whom were still alive and legally competent* (Ex. 21, p. 1, l. 7), gave a quit claim deed to the Urbandale company releasing any

claim, or purported claim, that they might have, as against the land or the stock. (This is Exhibit 21; also Trans. p. 31, ll. 1 to 9). Again, this deed had to be explained, because, of course, from 1952 on *nobody* had a claim of any kind to this land, or the stock issued against it; that is, after that deed was executed, the rather *fantastic lien* that the estate beneficiaries originally had, as to this Urbandale land was eliminated, and that was some two years before this taxpayer bought these certificates.

But the Circuit Court again disposed of this obstacle, at least to his own satisfaction, by saying (Op. p. 15, second paragraph):

> "Neither do we regard as opposingly significant the quit claim deed executed by the will beneficiaries in 1952 before the taxpayer's acquisition of the two certificates in 1954 * * *. Had the deed been intended to operate as a release of the will beneficiaries interest under the agreement, it is reasonable to assume that broader provisions to that effect would have been forthcoming."

This statement is made notwithstanding the *Transcript Record* when counsel for the Commissioner asked (Trans. p. 31, l. 1):

> "Q. Now, then, they also in consideration of that release their rights to the trust agreement. Is that correct?
> A. That's right."

The Court, after disposing of these four rather outstanding obstacles in more or less of an arbitrary fashion, took the final stand that these Trust Certificates, Exhibits 10 and 14, were not what they said they were, but they were sort of "partial claims" (Op. p. 15, l. 4, first paragraph):

> "Instead of being applicable to all the assets of the decedent's estate, they became confined to those

> fewer assets which had come from the estate to the trustee by way of the 'purchase', and pursuant to the understanding reached by all concerned. The release of the claims therefor had significance only as it freed untransferred assets of the estate from the claims of the six major creditors. These creditors' claims were still directed to the transferred assets."

Notwithstanding that the written record is directly opposed to the Court's theory, it is also a little bit strained as far as the principles of ordinary logic and human behavior are concerned in that this whole situation was set up with a background of an insolvent estate and six creditors that couldn't be paid. They *then* had a lien on the *whole estate*, and it is rather difficult to get the Court's "plan", based on the notion that these six creditors, of what there appeared to be an insolvent estate, became "big hearted" and gave up part of what they *already* had.

That isn't human nature, and moreover it isn't the record in this case, but possibly it is a better theory than the "trustee's notes" put forth in Exhibit C, and also by the Tax Court Opinion pages 19 and 20.

REASONS FOR GRANTING WRIT AND ARGUMENT IN SUPPORT

I

(Interpretation of 1954 Code, Sec. 1301)

The First Division involves the spreading of fees for personal services, and particularly the interpretation of Section 1301 (b) of the 1954 Code, particularly with reference to the "employment" of corporate officers.

We would assume that this was a matter of considerable importance as gauged by the frequency with which

spreading of "bunched income" occurs, and this Opinion for all practical purposes (in fact any purposes) eliminates any one designated as a corporate officer from the benefits of the Act.

Countless cases at all three levels of the Federal Courts approved the spreading of compensation received by corporate officers under the provisions of Section 220 (a) of the Revenue Act of 1939, and again as amended by Section 139 (a) of the 1942 Act, but under this Opinion the Court holds that Section 107 (a) of the 1939 Code was materially changed by the 1954 Act, and that a corporate officer was a "*general* employment" and not qualified as such, to to come within the definition "to effect a particular result".

At the time this Opinion was written, the case of *Wattley* v. *The Commissioner*, 275 F.2d 461 (2 Cir. 1960), had held that Congress in enacting Section 1301 of the 1954 Code had no intention of changing, or altering the prevailing principles under Section 107 (a) of the 1939 Code.

It would appear highly important to determine whether or not the 1954 Act (Sec. 1301) by the words "to effect a particular result" completely changes the statute, or possibly those words were intended merely *at most* to eliminate the questionable practice of attempting to "string together" several, separate and distinct employments.

In this instance the whole record shows beyond dispute that this small corporation *itself* was set up to be liquidated as soon as possible, and the taxpayer was the sole liquidating agent, with no interest of any kind in the corporation except that he served as a *nominal* officer and director. By the terms of the Circuit Court Opinion the taxpayer's "official position" made him *ineligible* to spread his compensation as a "director and liquidating agent" Exhibit 8. Par. 3.

We quote from page 10, Paragraph 3 of the Circuit Court Opinion:

> "*Wattley* (*Wattley* v. *Commissioner, supra,* 275 F.2d 461 (2 Cir. 1960)) would support the taxpayer's position here were his employment made, as he contends, only to effect the sale of the Polk County real estate. But his activities were broader than that. He was a director and an officer and the management force behind Urbandale."

In short, the *Wattley* case, from the Second Circuit in 1960, says there is no change in the spreading of fees for personal services, while this Opinion in the Eighth Circuit eliminates all corporate officers from spreading a compensation even though the employment might be to "effect a particular result" relating both to the corporation and the taxpayer personally. If he is a corporate officer, his work is *general.* Therefore he cannot qualify.

The corporation formed was not an ordinary conventional corporation, and the duty of your petitioner was not that which would be performed by a managing officer of a conventional, commercial corporation, because as shown by Exhibits 5 and 6, and the Transcript page 9, line 8 to page 12, line 12, this corporation was created in an emergency brought on by the depression (Ex. 6, p. 2, l. 5, p. 4, l. 18) in the late twenties and early thirties, half of its stockholders, in fact exactly half, were forced into the corporation to try to salvage this land near Des Moines, and the largest one of these "unwilling" stockholders was the First National Bank of Fort Dodge, Iowa, which had closed about the time of the organization of the corporation (Ex. 6, p. 4, third line of second paragraph), so it would seem perfectly obvious that this Urbandale corporation had but one purpose, one particular result to effect, and that was to sell this land as advantageously as possible.

and your petitioner, as a lawyer, was attempting to work out this *particular result*, but it took considerably more time and effort than he had originally expected.

There are *many* cases under the 1939 Code Section 107 (a) dealing with "bunched" income of an officer, manager or director of a corporation, being spread over the years in which it was earned.

Now, then, apparently this Court has in mind (under Sec. 1301 (b)) that the management of *any* corporation is not "an employment" to effect a particular result, and he even applies this to a situation where the *corporation itself* has but one objective.

There are two cases that we find, decided since the Code of 1954 became effective relating to this particular question, Sec. 1301 (b).

One is *Ranz* v. *C. I. R.*, 6th Circuit, 273 F.2d 810. A taxpayer was a sales agent for machine tools—no particular object in mind—just selling *any* tools to *any purchasers* he could find. The court held it was not an employment, because it was not designed to effect any *particular result*—just the routine business of selling tools.

Then there is still a later case of *Wattley* v. *C. I. R.*, 275 F.2d 461 (1960). It is rather an unusual case and somewhat similar to the case at bar, because the taxpayer was attempting to spread a commission for making a long-term lease that involved the Mutual Life Insurance Company and Manufacturers Trust Company. Apparently the taxpayer worked some nineteen years on the deal, and he finally made it. The Tax Court held against him on the theory that he had not qualified under the 80% rule as he had received a substantial amount of money from the corporation, by whom he was employed in the beginning while working on this same deal. The Circuit Court of

Appeals (Second Circuit) reversed the Tax Court, and permitted him to spread the fee over the years from 1944 to 1951, because during those years he collected no compensation from the corporation, and apparently the Court regarded the work of completing the lease as being something that was designed to effect a particular result; in fact, the Court rather indicates that there isn't any change in particular between 107 (a) of 1939 Code and 1301 (b) of 1954 Code. We quote as follows:

> "If we were taking a fresh view of Sec. 107 (a), we would have difficulty in seeing what difference it makes whether the taxpayer was acting solely as a broker repre ative of the corporation or as an individual broker. Assuming that he was acting solely for the corporation, it is still true that the nature of his services necessarily contemplated alternative times of feast and famine. If the taxpayer had to nurse along the transaction involving the Fifth Avenue property for nineteen years until a lease was eventually consummated, on which a commission was paid, it is hard to see why other entirely separate transactions should be used by the Tax Court to defeat the application of Sec. 107 (a). It is a fact, which the government does not discuss in its brief, that though the present case is covered by Sec. 107 (a), this alleviating provision was revised somewhat in phraseology in Sec. 1301 of the Internal Revenue Code of 1954, 26 U.S.C.A., Sec. 1301. *But it appears that the Congress did not suppose that it was changing the meaning of Sec. 107 (a) when it was enacting Sec. 1301 in its present form.* See H.R.Rep.No. 1337, 83d Cong., 2d Sess. A289 (1954); S.Rep.No. 1622, 83d Cong., 2d Sess. 445-46 (1954). See also 1 P-H 1959 Income Tax par. 7960, Frank Stephen Ranz, 1958, 31 T.C. 91, affirmed by the Court of Appeals, 6 Cir., 1960, 273 F.2d 810." (Our emphasis).

As we have pointed out, this whole record clearly shows that whatever phrases and formalities might be

used, that there was only *one problem* that this petitioner had in mind, and that was to sell this 220 acres so that the Certificate holders could realize as much money as possible on their Certificates. The corporation itself was sort of an idle form—it had no employees, not even any paid officers. It, as a corporation, did nothing except to pay the interest, taxes and mortgage payments, and divide the net royalty from the coal between the trustee and Kelleher. Your petitioner's efforts at all times were devoted to selling the land and liquidating the corporation. He, under the circumstances, did this through the corporation name, as its agent and manager, and lawyer.

In the earlier days of the corporation a sale was pretty much impossible *on account of economic conditions*, and later on it became an *absolute necessity* as coal mining in Iowa had become unprofitable (Ex. 6, pp. 7 and 8).

A sale was finally accomplished, and your petitioner, who had never received any compensation for his efforts in helping this corporation, for the specific purpose of selling the land, was paid the sum of $4,200.00, and certainly he never had but one object from the time this corporation was formed, that is, one particular result, and that was to sell the land and liquidate the corporation, because it had served its purpose when the land was sold.

We believe this record shows without any question that all the petitioner's activities on behalf of the Urbandale company, whether referred to as president, director or liquidating agent, *related to his services as a lawyer working for a corporation, in which he had no personal interest, to sell the one asset the corporation had, and to liquidate it.* It was purely a solo operation just as much, or even more so than, one law suit dragging on over a period of years.

This petitioner had but one object, and that was to liquidate the Urbandale company, which could only be done by selling the land; that was his one mission that had to be accomplished in order to close the Urbandale case.

Again, assume that there is some distinction between these two sections, which apparently was not intended by Congress, we suggest that this work by the petitioner was done between 1930 and 1955 (Exhibit 8). Section 1301 was enacted in 1954. At the time the petitioner performed almost all of the services, they certainly were *personal services* under the multiple interpretation of Section 107 (a), and he undoubtedly had a right to spread the pay he received for those services, if, and, when he received it. Now, Section 1301 was enacted in 1954.

We quote from 82 Corpus Juris Secundum, page 994:

> "Retroactive legislation changing rights is not favored, and the rule that statutes are not to be construed retrospectively unless such construction was plainly intended by the legislature applies with peculiar force. Hence, in so far as affecting vested rights, a statute will be construed as prospective only, and not as operating retrospectively or retroactively, unless that intention is made manifest either by express words or by a clear, distinct, necessary, plain, strong or unmistakable, implication."

Again, quoting from 82 Corpus Juris Secundum, page 845:

> "In the absence of definite indication of a legislative purpose to that end, the re-enactment of a statute does not affect its meaning or enlarge its scope, and is not regarded as a new enactment but a continuation of the language repeated; nor does mere change in language necessarily indicate an intention to change the law."

As supporting the quotations from Corpus Juris Secundum, we call the Court's attention to the case of *New York Life Ins. Co.* v. *Truesdale,* (4th Cir.) 79 F.2d 481, from which we quote:

> "In addition to this, it is a well-settled rule of construction that statutes effecting a change in substantive rights will not be given a retroactive effect unless it clearly appears, which is not the case here, that the Legislature so intended. Even statutes modifying statutes of limitations will not be construed as having the effect of reviving a cause of action already barred, if such construction can reasonably be avoided."

II

(Liquidating Dividends on Stock Constitute a Sale)

The question in this Second Division would appear to be very simple, and we quote the statement from the Circuit Court Opinion, last paragraph, page 11:

> "For present purposes we may assume, as did the Tax Court, that the certificates were capital assets under Sec. 1221's general definition of 'property held by the taxpayer'. And they were held by this taxpayer more than six months. The inquiry then is only whether the gain resulted from a 'sale or exchange'. This, of course, is essential if it is to qualify as long term capital gain. Dobson v. Commissioner, 321 U.S. 231, 232 (1944); Commissioner v. Gillette Motor Transport, Inc., 364 U.S. 130, 133 (1960)."

That left but one question. If the taxpayer could show a "sale or exchange", he was entitled to long-term capital gain, and it is elementary, of course, that the words "sale or exchange" do not carry the meaning usually given to them in everyday conversation.

The taxpayer's conclusions were very simple. He had two trust certificates. Exhibit 10 recited that he owned

.4666 percentage of the stock held by the trust, and Exhibit 14 recited that he owned .0388 percentage, so on both certificates he owned a trifle over 50% of the stock held by the trustee, and the trustee held 500 shares of Urbandale stock. The Urbandale company was completely liquidated in 1955 by a sale of its one asset, to wit, an interest in 220 acres of land. The money was paid by Urbandale as liquidating dividends to the trustee, and the trustee a few days later passed the money on to the owners of said stock. The trust was liquidated, and the stock was cancelled.

The taxpayer made his returns on the assumption that he had a long-term capital gain of something over $9,000, as he had owned stock that was liquidated by the complete liquidation of the corporation, which in fact was equivalent to a *sale*, in fact this operation is pretty much in the nature of a forced *sale* similar to the procedure in condemnation, but it is rather pointless to discuss the nature of "liquidating dividends" and why they constituted a "sale", because Section 302 of the 1954 Code, and likewise Section 331 (1954) Code, both recite that these dividends in liquidation "shall be treated as a distribution in part or full payment in *exchange* for the stock". (Our emphasis).

Again, looking at this matter from another angle, at the time that this Urbandale company was liquidated, this trustee had nothing of any value except 500 shares of Urbandale stock, and it received in liquidating dividends approximately $40,000, which was the net amount left from the sale of the land, and was paid in complete liquidation of the stock, so the trustee returned the stock to the erstwhile officers of the company, and it was cancelled (Ex. 6-Final Report of Trustee). We assume nobody could deny that the money received by the trustee in liquidation of all of its stock was described as liquidating dividends, and constituted a "sale" of the stock.

Again, these "liquidating dividends", when passed on to the six beneficiaries, retained the "same character in the hands of the beneficiary as in the hands of the trust". Consequently the money that passed on to this taxpayer from the trustee was identified as liquidating dividends in payment for his interest in the 500 shares of stock held by the trustee, and as such it was a "sale or exchange" and, as hereinbefore set out, this taxpayer has nothing more to prove except the "sale or exchange" as the other elements of the problem were conceded. That is what he thought.

As supporting the foregoing conclusion, which is more or less elementary, we call the Court's attention to Rev. Rul. 56-78, C.B. 1956-1, 648, also described as No. 6269 Rev. Rul. 56-78, I.R.B. 1956, 1027, and reference is made to Sec. 162 (b) of the 1939 Code (now identified as Sections 651-652, 661 and 662 of the 1954 Code).

> "Capital gains realized by the trustee from the sale of trust property, which are distributed to the beneficiaries under the provisions of 162 (b) of the 1939 Code, would also be capital gains in the hands of the certificate holders."

No criticism was made of this Urbandale situation until the matter reached the "Accounting Office" (or Appellate Division) in Omaha, and the Deficiency Notice ultimately filed by the so-called Appellate Division, and identified herein as Exhibit C in Schedule 2-Par. (d), determined that the gain was "ordinary income", because it was realized from the "liquidation of trustee's notes rather than * * * received in liquidation of corporation stock". Again, in Exhibit C, Schedule 5, Par. (b), this same finding was repeated by the Appellate Division; that is, the liquidating dividends of the Urbandale corporation were said to be payments on "trustee's notes", and therefore there was no "sale or exchange".

Again, when this question reached the Tax Court, T.C.Memo 1962-230, the Tax Court followed the Appellate Division, and held no long-term capital gain established, because there was *no sale or exchange,* and there was no sale or exchange because the *liquidating dividends* were applied to "trustee's notes". (Appendix "C", pp. 19-20).

No explanation appeared in either Exhibit C (Deficiency Notice) or the Tax Court Memo 1962-230, indicating why Exhibits 10 and 14 were "trustee's notes", as obviously there was no promise to pay any amount, at any time, at any place. Again, the trustee that signed Exhibits 10 and 14, to wit, the First State Bank & Trust Company, on the 17th of February, 1931, obviously could not, and would not, under any circumstances have executed a note or "evidence of indebtedness" in executing Exhibits 10 and 14 (and also the other four trust certificates). In fact, said trustee followed out the very specific provisions of Exhibit 5 (p. 10, last 4 lines) in the Trust Agreement:

> "said trustee to be authorized to execute any *appropriate pledge* to assure said creditors that said corporate stocks are held by said trustee as security for their benefit pro rata of said several creditors." (Our emphasis).

For reasons that we assume are obvious, the Circuit Court could not very well go along with the Tax Court's idea about "trustee's notes", but we really can't feel that the situation has improved much, if any, as the C.C. Opinion described the six certificate holders as "claimants against the trustee". In rather a broad sense we assume that this is true, but not in the way the Court had in mind. because every stockholder would *in a sense* be a claimant even as against the corporation which issued the stock.

Nevertheless under the Federal Statutes, and particularly Code Section 302 (a) and Sub-Sec. 3 of the 1954 Code, and Code Section 331 of the 1954 Code, *liquidating dividends* paid on corporation stock constitute a "sale or exchange" even though the stockholder could be considered to be a "claimant" in a broad sense, a *very broad sense.*

Again, the Circuit Court had to find that the six claimants did not release their claims in Exhibit 5, although Paragraph 7, page 5 of said exhibit, stated:

> "The following claims of the undersigned creditors against said estate of W. N. Merritt shall be satisfied and released by payment as part of the purchase price of the property to be so purchased from said executor with interest computed to September 1, 1930, to wit."

All six claimants signed, the executor and the estate beneficiaries signed, but the Opinion states on page 14, last line:

> "This, however, we do not construe and interpret as effecting a novation or basic change in the posture of the six creditors and their successors. Their interests were still in the nature of claims definite in amount and with a specified interest rate. Instead of being applicable to all the assets of the decedent's estate, these became confined to those fewer assets which had come from the estate to the trustee by way of the 'purchase' and pursuant to the understanding reached by all concerned. The release of the claims therefore had significance only as it freed untransferred assets of the estate from the claims of the six major creditors. These creditors' claims were still directed to the transferred assets."

Let's look at the Court's ruling a minute. He says that these six hard pressed creditors of what looked like an insolvent estate, five women, mostly on the elderly side, and one insolvent bank, were, in fact, in Exhibit 5, entering

into an agreement to release from their respective and fair liens *all of the assets in the estate* except this Des Moines property.

According to the Court this benevolent, charitable group of creditors were going to give up their claims to all of the assets and settle for a few of the "transferred assets". There is absolutely nothing to support this rather far fetched idea, because the claims were absolutely released in every respect. The so-called "transferred assets" were sold and delivered to the creditors, or to a trustee selected by them, for the sum of $27,500. The trustee forthwith deeded the so-called "transferred assets" immediately to the Urbandale company.

Again, in connection with this unique, but rather difficult to prove, theory that the Circuit Court adopted, that these instruments, Exhibits 10 and 14, were in fact "partial claims" against part of the assets of the Merritt estate, or against the trustee, we do not know which, we call your Honor's attention to the agreed Stipulation of Facts, and particularly Item 13, which reads:

> "Attached hereto, and marked Exhibit 10, is a photostatic copy of a Trust Certificate issued on February 17, 1931, by the First State Bank & Trust Company of Fort Dodge, Iowa, as Trustee, to the First National Bank of Fort Dodge, Iowa, in exchange for its claim against the Estate of W. N. Merritt, deceased."

Apparently when we drew the Stipulation of Facts, we were dealing in whole claims and not *partial* claims.

Again, the Circuit Court was confronted with the language of the certificates, see Exhibits 10 and 14. The Opinion says with reference to this (Opinion, p. 12, last paragraph):

"That they were exactly that is a result which seems to us to be unavoidable. It is true that each certificate recites that the holder 'is the owner of (a stated percentage) of the equitable ownership and beneficial interest in' named stocks, including Urbandale, 'title to which' is held by the trustee, 'for the benefit of the holder'. *But labels do not determine ultimate character.*" (Our emphasis).

We believe that the last line is more or less indicative of the Court's reasoning as a whole with reference to the certificates.

Again, the Court was confronted by the quit claim deed executed by the beneficiaries of the Merritt trust in 1952, and the Opinion says:

(Opinion page 15) "Neither do we regard as opposingly significant the quit claim deed executed by the will beneficiaries in 1952, before the taxpayer's acquisition of the two certificates in 1954 but after the coal mining operations had ceased. *Its apparent purpose, it seems to us, was that of title clarification.*" (Our emphasis).

The Court does not explain that the complete (undisputed) record shows these payments in 1955 and 1956 were all liquidating dividends. No attempt is made to circumvent this, that is, the Urbandale land was sold and the net proceeds were paid on the stock to liquidate it, and one-half of the money went to Kelleher and one-half to the trustee. The trustee held one-half of the stock, and Kelleher owned the other one-half of the stock. Liquidating dividends as to both halves constituted a "forced sale". Any stockholder, who owns stock in any corporation, and the directors decide to liquidate the company, the stockholder is necessarily a "seller" on a "forced sale", and one-half of this money went to the trustee as liquidating dividends. Obviously, it was a "sale" and in this case

"capital gain" as opposed to the dividends that were paid out on coal royalty for seventeen years, as said coal royalty dividends were ordinary income, both to the trustee and the actual owners of the stock, which were the six certificate owners. As shown by the record (Ex. 6, p 13, Par. 2) the Urbandale stock, which was held by the trustee, was all liquidated and returned to the erstwhile officers of the company (Ex. 6-Final Rep. of Trustee).

It is rather interesting to note that this liquidation of Urbandale, which amounted to approximately $80,000 went one-half to Kelleher and one-half to The State Bank, as trustee, for these six people who owned the stock. Obviously, on Kelleher's one-half, he made money between what the stock cost him in '31 as against the liquidating dividends of $40,000 in 1955-1956. No one, I think, could deny that *it was a long-term capital gain.* The trustee sits in exactly the same position with the same number of years and the same number of shares. Obviously, it is long-term capital gain to the trustee just as it is to Kelleher, and whatever its character is as to the trustee, it maintains the same character, to the taxpayer, as the trustee was nothing more than an agent for the six owners of 500 shares of this stock of Urbandale. What is capital gain for Kelleher is capital gain for them.

The Court attempted, at least, to assume that the quit claim deed, Exhibit 21, had some motive or ulterior purpose not disclosed by the record at all, when he said on page 15 of the Opinion:

> "Its apparent purpose, it seems to us, was that of title clarification."

There is nothing to support, or even suggest this supposition, and he goes on further in the same paragraph by saying:

> "Had the deed been intended to operate as a release of the will beneficiaries' interests under the agreement, it is reasonable to suppose that broader provisions to that effect would have been forthcoming."

The Record shows at page 30 of the Transcript the rights of the beneficiaries under Exhibit 5, page 5, Par. 5, were being discussed by counsel for the government, and the said government attorney was inquiring (Trial before Tax Court) of the taxpayer on cross-examination as to whether or not *he* drew said Exhibit 5, and the taxpayer answered (Trans. p. 30, l. 23):

> "That's right. I drew that, but the land was deeded outright in '52. Eventually to avoid any question about the thing, the heirs signed a 'quit claim deed'."

Continuing on page 31, line 1: Commissioner's attorney cross-examining taxpayer:

> "Q. Now, then, they also in consideration of that release their rights in that trust agreement; Is that correct?
>
> A. That's correct.
>
> Q. It is signed by Margaret Merritt, Doris Olney Merritt, guardian for William O. Merritt, Allen Merritt and Floyd Merritt, minors, beneficiaries under the will of W. N. Merritt, and by Maurice J. Breen. They released their rights in the property to the trust?
>
> A. That's right. There is the deed. I said '52; that's right '52."

It is a little bit difficult to rechristen and completely reverse the import of several of these key exhibits, to wit, the release of the claims in Exhibit 5, the *very* essence of the trust certificates, Exhibits 10 and 14, and the record on the *sale* and *deed* by the estate to the Trustee, the *deed* by the Bank, as Trustee, to the Urbandale Company (Trans. p. 10, l. 7), the fact that the Trustee was the agent of the

six creditors (Trans. p. 10, l. 9), and again the quit claim deed (Ex. 21) in 1952. There is nothing to support the Court in this position, except his desire not to believe what he sees.

It may be assumed that the only question in this division, at least as looked upon by the Circuit Court, was whether or not this was a "sale or exchange". This is stated at the top of page 12 of the Opinion. The Court then in the next succeeding paragraph (page 12, Par. 2) says:

> "It is well established that, apart from the existence of a qualifying definition, payments made upon an obligation do not constitute a sale or exchange. Fairbanks v. United States, 306 U.S. 436, 437 (1939); Graham v. Commissioner, 304 F.2d 707, 708 (2 Cir. 1962); see Paine v. Commissioner, 236 F.2d 398 (8 Cir. 1956). Just such a special definition is contained in Sec. 1232 (a) (1) with respect to certain evidences of indebtedness."

We take it by this paragraph above stated that the Court held that Exhibits 10 and 14 were "obligations" rather than *certificates of partial ownership* in the Urbandale stock held by the trustee. That is the essence of this controversy. The Court says that these two exhibits were "obligations". The word itself without any amplification does not mean much, I suppose, other than to classify it, as being something related to a note or bond, or again as a "partial claim" against "transferred assets" in the hands of the trustee.

This whole deal about the "partial claim" and the "transferred assets" is rather novel, and certainly there is nothing in the record that supports it; in fact, irrespective of the record, or this case in particular, I would assume that the whole idea was pretty much new and untried.

Apparently the certificates, according to the Court, *must be "obligations"*, rather than fractional interests in corporation stock, as that is what each instrument said it was, a fractional interest in the ownership of Urbandale stock.

Again, going back to the Court, he must have thought that it was obvious that these certificates were *not* "trustee's notes", as held by the Tax Court, so he called them "partial claims"; in other words, the First National Bank signed Exhibit 5, and released its claim against the Merritt estate *in full*, again released its claim on the probate records, and in consideration of that *complete* release entered into this purchase agreement for the Merritt land for $27,500, the *total amount* of the six claims, and secured a deed from the Merritt estate to the trustee *selected by the six creditors, as their agent*, to hold this land (and the stock was subsequently issued in place of the land) *for the six creditors.* The Bank (First National) really had not done these things at all *according to the Court.* It actually did not release its claim against the estate. The Court said that it merely released *some of the assets of the estate*, and again it did not *buy* the Des Moines coal property at all; in fact, according to the Court, when the deal was finished, the First National Bank had not released its claim. It had merely limited its lien, under its claim against the estate, to this stock, and the *estate* owned the stock (not the six creditors) in the name of the trustee. When the stock was liquidated, the *liquidating dividends* were paid. They were paid to this taxpayer not as a stockholder, but as a "partial claimant" against the Merritt estate, that is the Circuit Court's version of this question.

To go along with this notion that Exhibits 10 and 14 are "partial claims", you must deny in every respect that these claims in 1930 and 1931 were absolutely released

and satisfied, as to this estate, you must deny in consideration thereof ($27,500) the estate deeded this Des Moines property to the trustee, who was nothing more than an agent or assignee for the six creditors. (Trans. p. 10, l. 9). They bought the land for the claims. They selected the Bank as their agent, and it in turn, that is, the bank trustee, took title to the Urbandale stock *for the six creditors* (Trans. p. 10, l. 9), that is the whole case, and that has to be denied *in its entirety* in order to convert Exhibits 10 and 14 into "partial claims", and again to convert the Des Moines property, which was bought and paid for, which was deeded and redeeded twice afterwards into "transferred assets", or an unsold part of the *estate assets,* to a trustee.

The Court in the vital paragraph, which we quoted on Page 12 of the Opinion, cites three cases, which one would assume must support his theory, but not one of the cases has the *slightest* relation to his idea.

The *Fairbanks* case (*Fairbanks* v. *United States,* 306 U.S. 436, 437) involves nothing but conventional corporate *bonds* that were redeemed before maturity, and under ordinary circumstances a bond is an obligation. It is not stock, and has no relation at all to Sections 302 and 331 of the 1954 Code, which specifically provide for the liquidation of *corporate stocks*—not bonds.

Again, the second case cited, which is *Graham* v. *Commissioner,* 304 F.2d 707, 708 (2 Cir. 1962), involves German *bonds* given in settlement of war debts. Apparently the bonds were bought for $10 a bond and ultimately the buyer received $2,000. These again are *bonds,* and have no relationship to this case on trial *whatsoever.*

The third case that the Court cites is *Paine* v. *Commissioner,* 236 F.2d 398 (8 Cir. 1956). The obligations involved in this case were *serial promissory notes* coming

due over a period of years, given as part of the purchase price of some Minnesota land, or mineral rights.

It must have been obvious to the Court that these two bond cases, and one promissory note case had nothing to do with the case at bar, because every one connected with the case, who is familiar with it at all, knows that a bond, or a note, is an *obligation*, and that liquidating payments on it, a bond or a note, are *not capital gain but ordinary income*. Moreover the Court must have known that these three cases did not sustain, or even relate to, his notion that Exhibits 10 and 14 were "partial claims" against "transferred assets". And said Court well knew that the liquidating dividends of the Urbandale company paid in 1955-1956 were paid to this taxpayer as the owner of a trifle more than 50% of the Urbandale *stock* in the hands of the trustee, which in fact amounted on the whole to a trifle *over 25% of the total stock in the Urbandale company.*

Under Code Sections 302, 331, 652 and 662 of the 1954 Code these liquidating dividends, that came into the hands of the trustee, represented and constituted a "sale or exchange" of the stock, all these funds continued to be the proceeds of a "sale or exchange" when immediately transferred to the beneficial owner of the stock, to wit, this taxpayer.

CONCLUSION.

The Circuit Court Opinion is beautifully written from a rhetorical viewpoint, and it certainly evidences an unusual familiarity with the facts, and again the handling of Division II, so as to eliminate the "Trustee's notes" theory of the Tax Court, and substitute one that surely was new and unique but, as far as we can see just as fallacious and unsupported as the "Trustee's Notes" idea, took unusual

work, or ability, or probably both, because, if one were not too familiar with the situation, and the peculiarities of the Statutes dealing with the matter of liquidating dividends as applied to corporation stock and corporation held by the trustee, it could be, and was, most readable and convincing.

We ask that this Petition be granted, because the Opinion sets up an entirely new interpretation of the Statutes in reference to the "spreading of fees for personal services", and is in direct conflict with a similar Opinion in the Second Circuit.

Again, this Opinion ignores the statutes relating to corporate liquidating dividend as constituting a "sale or exchange" of *stocks*, and this obviously is most important where the rules in reference to "capital gain" are so vital to the American taxpayer, and that is particularly true with reference to corporation stocks, as a common type of investment.

Respectfully submitted,

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